

The applicants' expert rendered his opinion that Town Line (c) above is "probably the most probable location" of the line. (Exhibit # 57c, p. 5)

4. The project, if located in West Rutland, would conform with the Town Plan. The project, if located in the Town of Rutland, would not conform with the Town Plan's designation for residential use only.
5. As a matter of law, "acquiescence in a wrong boundary line, whatever its duration, will not change the true division line established in the legislative grant" (10 V.S.A. §1461 - annotation citing Brookline v. Town of Newfane 126 VT 179 (1966)).

IV. DECISION

The Commission finds that the legal boundary line between the municipalities of the Town of Rutland the West Rutland cannot be located. The proposed project appears to be located very close to a possible location of the line if the two towns take the steps necessary to establish and monument their boundary line. The applicant requested that the Commission make a decision on conformance with Criterion 10.

Our decision is that the evidence of Conformance with Criterion 10 is insufficient as to which municipality the project is sited. Therefore, the permit is denied for failure to provide evidence sufficient for this Commission to find affirmatively with respect to conformance with Criterion 10.

Under 10 V.S.A. §6088, the applicant has the burden of proof on Criterion 10. We hereby incorporate by reference in this decision our Hearing Recess Order #2 dated April 29, 1994. In that Order, we required "evidence sufficient to conclude that the project applied for is legally located in one town or the other without engaging in undue speculation" (Recess Order #2, pp. 2-3) (emphasis added), see also Washington Electric Cooperative, Inc. Findings of Fact, Conclusions of Law and Order #5W1035-EB dated December 19, 1980).

As noted in prior statements by Acting Chairman Charles Shortle and in prior written orders, the Commission has no authority to establish a municipal boundary line. In this case, the Commission gives considerable weight to the conclusion of surveyor Peter Chase who informed the Towns in 1988 that "no written description or graphic representation was found whereby the boundary line in question can be located or surveyed on the ground with any degree of accuracy" (Exhibit #52a, p. 1). The Commission also assigns significant weight to the applicants' own surveying

expert, Mr. Krebs, whose report concludes, among other things, that "none of the written evidence has a description that can be reproduced with any absolute certainty on the ground" (Exhibit 57c, page 2).

The applicants argue that their provision of tax records, surveying data, deed descriptions, town meeting notes, and appraisal records establishes the project site as being in West Rutland, Vermont by a preponderance of the evidence. The Commission finds, however, that the applicant has collected evidence relevant to establishing the line under 2 V.S.A. §17 or 24 V.S.A. §1461, but that the preponderance of the evidence in the case before this Commission - including the two professional survey reports cited above - is that the location of the legal boundary cannot be determined.

The Commission concludes that a boundary line which cannot be located on the ground by professional surveyors is no boundary line at all. For this Commission to take the "best guess" approach apparently taken by state and municipal bodies in the past would be to engage in undue speculation when reviewing this project for conformance with Criterion 10 (Town Plan).

At the third and final hearing on this matter, the applicants' surveyor Mr. Krebs, introduced new evidence including town meeting notes, an appraisal, and Mr. Krebs' assertion that the "central district" may have included District 12. The Commission finds that this evidence further clouds the boundary issue and is not helpful to our resolution of this matter. Finally, the applicant presented a legal memorandum "Regarding Legal Standards Applicable to Determination of Whether Project is in West Rutland or Rutland." (Exhibit #63). This memo raises issues which the Commission will address as follows:

1. Applicant asserts that his evidence is directly relevant to where the legislature intended the line to be. We agree. As noted above, we believe that applicant's information will be found relevant to the Superior Court or Legislature's resolution of this boundary line issue.

The applicants' surveyor found evidence of at least four prior line locations or descriptions. Moreover, the two towns hired a surveyor in 1988 to help them try to find the line. The applicant has conceded that the legislature created the Town by reference to school districts, but the applicant's expert surveyor stated at the third hearing that he found evidence that the school districts were changed frequently over the years. If the Town of West Rutland is made up of School Districts, presumably the only school district boundaries relevant to this issue are those in existence on November 19,

1886 - the day the Legislature created West Rutland. Otherwise, the boundary would change every time a school district changed, and neither School Boards or District Commissioners have the authority to change municipal boundary lines. In summary, the Commission believes that the line cannot presently be located on the ground. If the Town's have engaged in "acquiescence long endured," then this Commission would not expect to have seen evidence of at least four possible line locations, or an attempt by the Town of Rutland to tax the parcel, or the hiring of a surveyor by the two towns in 1988 to see if their line could be found.

2. Because the Commission finds that the 1988 survey alone is sufficient evidence of lack of "acquiescence long endured," we do not reach the applicant's second argument that "acquiescence alone can be dispositive in establishing a boundary line."
3. The applicants' third argument is that the "applicant need not prove the location of the line exactly according to the charter." The applicant then cites language from the Supreme Court which allows the line to be located "as nearly according to the charter as it reasonably can be" (Town of Searsburg v. Town of Woodford 76 Vt 370 (1904)). This case predated the enactment of Act 250 (1970). The clear meaning of the Supreme Court in Searsburg is not that Act 250 projects can be subject to undue speculation, but that municipalities are obligated to locate their line as nearly according to the charter as it can reasonably be. The Commission believes that this will be helpful to the Towns when they get their line established by the proper procedures available to them under the law.

V. CONCLUSION

Until such time as the Town of Rutland and the Town of West Rutland formally establish and monument their boundary line, the location of the proposed communications tower will remain in doubt. The applicant was obligated to prove to the Commission in this case that the project was in fact and in law located in West Rutland and that the tower could be built in that location under West Rutland's Town Plan (Criterion 10).

We find that the applicant has failed to produce evidence of the project's location sufficient to avoid undue speculation by the District Commission. This difficulty is compounded by the proximity of the project with the various possible lines, and by the fact that we would not find conformance if the project site is found to lie in the Town of Rutland.

Application #1R0766
Decision on Criterion 10
Page 7

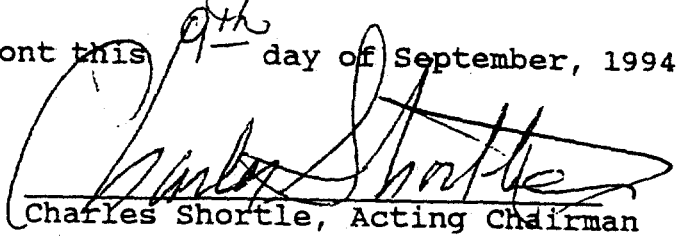
Under these circumstances the Commission cannot find affirmatively with respect to Criterion 10, and this application is denied.

The Commission acknowledges the serious effort by the applicants to find the legal line. We greatly appreciated that effort and believe that the landowners, the applicants, and prior state and local administrators have suffered for lack of a clear boundary line for over 100 years.

To put this issue to rest, the Commission encourages the municipalities in question to seize this opportunity to locate, monument and legally establish their municipal boundary line.

Application #1R0766
Decision on Criterion 10
Page 8

Dated at Pittsford, Vermont this ^{9th} day of September, 1994.



Charles Shortle, Acting Chairman

District #1 Environmental Commission

Charles Shortle, Acting Chairman
Anne DeBonis
Warren Crawford

By: William Burke
District Coordinator

ATLANTIC CELLULAR COMPANY, L.P.
APPLICATION #1R0766

EXHIBIT LIST

1. Letter from Dicovitsky, Development Consultants Inc., 1/25/94, Re: Application Submittals
2. Application
3. Schedule B
4. Project Location Map, Boardman Hill Road
5. Sketch Showing Telecommunications Line
6. Cover Sheet, Atlantic Cellular, Boardman Hill, Vermont, Cell Site
7. Vicinity and Location Maps, 7/8/93
8. Graphic Standards, 1/27/92
9. Plot Plan - Partial, 7/12/93
10. Plot Plan - Partial, 7/12/93
11. Plot Plan - Partial, 7/12/93
12. Plot Plan - Partial, 7/12/93
13. Compound Area Plan, 7/9/93
14. Fencing Details & Specifications, 1/24/92
15. Fencing & Access Road Details, 1/24/92
16. Equipment Shelter Foundation Plan, 1/24/92
17. Coax Cable/Antenna Orientation Detail, 4/14/93
18. Power/Telco Details, 1/24/92
19. Waveguide Bridge Details
20. Propane Tank Concrete Pad & Misc Details, 7/23/93
21. Exterior Grounding Details - Equipment Shelters, 4/10/93
22. Exterior Grounding Details, Waveguide Bridge Details, 3/25/93
23. Exterior Grounding Details, 3/25/93
24. Exterior Grounding Details, 3/25/93
25. Alternative Grounding Methods, 6/23/93
26. Ice Bridge Detail for Propane Tank, 7/23/93
27. Tower Profile, 8/5/93
28. Construction Means and Methods, Boardman Hill Vermont
29. Municipal Impact Questionnaire
30. Equipment Shelter Description
31. Letter from Marshall, Nongame and Natural Heritage Program, 12/29/93, Re: No Rare or Irreplaceable Natural Areas or Endangered Species
32. Specifications of Air Conditioner, Marvair
33. Letter from Philbrook 12/27/93, Re: No Significant Impact On Forest Soils
34. Memorandum of Lease, 7/27/93
35. Major View Shed Orientation
36. West Rutland Board of Adjustment Findings of Fact, Conclusions and Resolution, Granting the Conditional Use Permit, 1/14/94
37. Zoning Ordinance Map, Town of West Rutland, Adjoining Property Owners Penciled In
38. Sketch of Boardman Hill Road Area, Submitted by Joe Zingale, Town of Rutland, at 1st. Hearing, 3/14/94
39. Letter from Agency of Transportation, 2/16/94, Project Should Be Addressed by Town Officials
40. Letter from Scott Darling, Fish and Wildlife, 3/7/94, Re: No Impact on Critical Wildlife Habitat
41. Letter from John Bloomer, 2/14/94, Re: Notice of Appearance on Atlantic Cellular Hearing, 2/14/94
42. Motion for Continuance, John Bloomer, 2/21/94, Re: Request for Hearing Set for 2/24/94 be Postponed

- 43. Letter from Dicovitsky, 2/22/94, Re: Two Additional Exhibits, and Comments on Stuart Slote's Recommendations
- 44. Memorandum from Stuart Slote, 1/24/94
- 45. Letter from CVPS, 2/4/94, Re: Capacity to Serve Project
- 46. Confirmation that Applicant Waives its Right to a Hearing Within 40 days of Submission of Application, 2/22/94
- 47a. Letter from Dicovitsky to Peter Kunin, 3/11/94, Re: Question on Location of Boundary Line
- 47b. Deed for Heleba Property, 3/27/74, Charles Heleba to Irene M. Hughes
- 47c. Warranty Deed, Boardman, 5/1/1901, Charles H. Boardman to Edward P. Gleason
- 47d. Grant Boardman, Administrator of Estate of Edward P. Gleason, 4/25/1927
- 47e. Tax Bill for WNYT-TV Tower; 7/2/93, Town of West Rutland
- 48. Letter from Zingale, Town of Rutland, 3/23/94, Re: Recess Order Request
- 49a. Letter from Yennerell, Town of West Rutland, 3/31/94, Re: Recess Order Request
- 49b. Warranty Deed, Heleba Property, 3/27/74, True Copy, Attest Jayne Pratt, West Rutland Town Clerk
- 49c. Warranty Deed, Anna Heleba to Charles and Mary Heleba, 5/5/47, True Copy, Attest Jayne Pratt, West Rutland Town Clerk
- 49d. Quit Claim Deed, Irene Hughes to Charles W. Heleba and Richard C. Heleba, 3/27/74
- 49e. Warranty Deed, Grant Boardman, Administrator of Estate of Edward P. Gleason, 4/25/1927
- 49f. Warranty Deed, Charles Boardman to Edward P. Gleason, Town of West Rutland, 5/1/1901
- 49g. Grand List, Town of West Rutland, 1902
- 49h. Grand List, Town of West Rutland, 1894
- 50a. Letter from Peter Kunin, 4/8/94, Re: Response to Recess Order of 3/15/94
- 50b. Tax Bills From Town of West Rutland Showing that the Boardman Hill Property is Taxed by Town of West Rutland
- 50c. Statement from Richard F. Oberman, L.S., Explaining his Basis for Stating that Property is in West Rutland, 4/7/94
- 50d. Copy of Mr. Oberman's Land Surveyor License, 10/1/1992
- 50e. Board of Adjustment Resolution on Appeal Request, 9/28/82, Granted Permit to WNYT Channel 13 Tower
- 51a. Letter from John Bloomer, 4/11/94, Re: Response to Recess Order of 3/15/94
- 51b. Copy of Map of Town of Rutland from Beers' 1869 "Atlas of the County of Rutland"
- 51c. Copy of Public Act No. 138, Entitled, "An Act to Incorporate the Town of West Rutland," 11/19/1886, Vermont Legislature
- 52a. "Report on Research of the Mutual Boundary Line Shared by the Towns of Rutland and West Rutland," Peter E. Chase, 12-29-88
- 52b. Inspection Report, Heleba Property, 2/16/88
- 52c. Letter from DelBianco, Rutland Town Clerk, 4/25/94, Certifying Charles Heleba Property Appeared on 1987 Rutland Town Grand List, and the Taxes Paid
- 52d. Tax Bills, Rutland Town, 1987, 1993
- 52e. Grant Boardman, Administrator of Estate of Edward P. Gleason, 4/25/1927
- 52f. Warranty Deed from Charles W. Heleba to Irene M. Hughes, 3-29-

- 53. Letter from J. Barry Burke, 4/19/94, Stating that Charles Heleba Property Never Listed on Rutland Town Grand List During his Tenure as Lister 1968-1994.
- 54. Copy of Subpoena of J. Barry Burke, Signed Charles Shortle, 4/20/94
- 55a. Letter from Kunin, 4/26/94, Re: Argument of Sufficient Information; Preponderance of Evidence; Is Parcel in Question in Town of Rutland or West Rutland?
- 55b. Supporting Document to 55a, Pratt's Propane #3R0486-EB, 1/27/87
- 55c. Supporting Document, Brookline v. Newfane, 126 Vt. 179, 183 (1966)
- 55d. Supporting Document, Washington Electric Cooperative, Inc., 5W1036-/EB, 12/19/90
- 55e. Supporting Document, 24 V.S.A. § 1462, Chapter 47. Town Lines
- 56. Letter from Kunin, 5/27/94, Re: Request for Additional Time to Submit Evidence as Required by Hearing Recess Order No. 2
- 57a. Letter from Kunin, 6/30/94, Re: Summary Report by Robert C. Krebs, and Map
- 57b. Map, "Composite Map to Accompany Report," 6/30/94
- 57c. "Report on a Portion of the West Rutland - Rutland Town Line," Boardman Hill Area, June 1994, Robert C. Krebs
- 58a. Letter from Dicovitsky, 6/8/94, to Clarendon Board of Selectmen and Planning Commission, Re: Failure of Notice to Town of Clarendon
- 58b. Letter from Dicovitsky to Bersaw, Clarendon Town Planning Commission, 6/30/94, Re: Request for Written Waiver of Rights Due to Failure of Notice
- 58c. Letter from Bersaw, 7/5/94, Re: Planning Commission and Selectmen Waive the Right to Timely Notice
- 59a. Letter from Kunin, 7/25/94, Re: Response to Recess Order #3
- 59b. Letter from Krebs, 7/22/94, Re: Distance from Quarterline Road to the Mapped School District Number 21
- 59c. Chronoflex, Towns of West Rutland - Rutland, 10/22/71, Project No. F020-1(11), Sheet B of I
- 60. Map, West Rutland, Sheet 34 of 72
- 61. Map, West Rutland, Sheet 35 of 72
- 62. Map, West Rutland - Rutland, 10/11/72, Project No. F020-1(11), Sheet No. F of I
- 63. "Memorandum Regarding Legal Standard Applicable to Determination of Whether Project is in West Rutland or Rutland," Kunin, 8/19/94
- 64. Maps for America, Third Edition, 1987 First Edition published in 1979 as A Centennial Volume, 1879-1979
- 65. West Rutland Real Estate Appraisal for the Years 1903, 1904, 1905, 1906
- 66. 1824 Town Meeting of the Town of Rutland
- 67. Bloomer's Response to Kunin's "Memorandum," "Opposition Memorandum Regarding Legal Standard Applicable to Criterion 10," 8/26/94
- 68a. Letter from Kunin, 8/25/94, Re: Response to District Commission's Request; Copies of Documents Presented at 8/19 Hearing, (Exhibits #65, 66 and typed version of 66)
- 68b. Notarized Copy of Exhibit 65, "West Rutland Real Estate Appraisal"
- 68c. Typed Version of Exhibit 66
- 68d. Notarized Copy of Exhibit 66

CERTIFICATE OF SERVICE

I, Carmelita L. Brown, hereby certify that I sent a copy of the foregoing Findings of Fact, Conclusion of Law and Final Decision on Criterion 10 for Land Use Permit Application #1R0766 on September 9, 1994, by U.S. Mail, postage prepaid, to the following:

Atlantic Cellular Company,
Attn: John Kelly
15 Westminster Street
Suite 830
Providence, RI 02903

Charles W. & Richard C. Heleba
P.O. Box 85
Quarterline Road
Center Rutland, VT 05736

Development Consultants, Inc.
Attn: Gregory A. Dicoivitsky
175 Lower Judson Lane
Stowe, VT 05672

Town of West Rutland
Tom Yennerell, Town Manager
P.O. Box 60
West Rutland, VT 05777

West Rutland Planning
Brian Harrington
P.O. Box 115
West Rutland, VT 05777

West Rutland Town
Chester Brown, Jr. Chair
Board of Selectmen
P.O. Box 60
West Rutland, VT 05777

Town of Rutland
Rodney Gallipo
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Charles Brothers
Rutland Town Planning
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Administrative Assistant, Rutland Town
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Ralph Austin
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North Clarendon, VT 05759

Clarendon Town Planning Commission
Richard Bersaw
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Rutland Regional Commission
c/o Mark Blucher
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Kurt Janson
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Katie Adams
Cumberland Blues Co. Inc.
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Kip Fry
P.O. Box 89
North Clarendon, VT 05759

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Burlington, VT 05401

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South Burlington, VT 05401

Frances Flynn
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Robert Krebs
Krebs & Lansing
10 Main Street
Colchester, VT 05446

J. Barry Burke
McKinley Avenue
Rutland, VT 05701

Marshall Fish
Prospect Hill Road
Rutland, VT 05701

Howard Burgess
Center Rutland, VT 05736

Dated at Pittsford, Vermont, this 9th day of September, 1994.

By: 
Carmelita L. Brown
District Office Chief Clerk

FOR YOUR INFORMATION ONLY

Department of Public Service
c/o Stuart Slote
Energy Efficiency Division
120 State Street
Montpelier, VT 05620

State of Vermont
ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Gary Savoie d/b/a WLPL
and Eleanor Bemis

Land Use Permit Application
#2W0991-EB (Reconsideration)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. BACKGROUND

The above-referenced matter comes before the Board on appeal from the decision of the District #2 Environmental Commission ("Commission") to grant Gary Savoie d/b/a WLPL and Eleanor Bemis ("Applicants") a land use permit pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250"). The Applicants were initially granted Land Use Permit #2W0991 by the District Commission on March 8, 1995. On April 5, 1995, two appeals were filed with the Environmental Board ("Board"): one by Sarah Ann Martin and the other by Edmund and Veronica Brelsford. The Board considered the appeals and on October 11, 1995, issued a decision denying the permit. For the Board's initial permit denial see Re: Gary Savoie, d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 11, 1995) ("Decision"). In the Decision, the Board declined to issue a land use permit because the proposed tower failed to comply with Criterion 10 of 10 V.S.A. §6086(a), with respect to the Windham Regional Plan ("Regional Plan").

Specifically, the Decision noted that the Applicants' application did not conform to the Regional Plan's policies to discourage construction of new communications facilities in favor of existing facilities. The Applicants were, therefore, informed with specificity of the sole reason for the Board's denial. In order to attempt to remedy the deficiency which led to the Board denial, the Applicants requested that the Commission reconsider their application. The request was timely filed pursuant to Environmental Board Rule ("EBR") 31(B) and sought to correct the deficiencies in the application which were the basis of the permit denial.

On May 24, 1996, the Commission issued its decision to grant the permit after review of the Applicants' request for reconsideration of the Decision ("Reconsideration Decision"). The Reconsideration Decision authorized the Applicants to construct a 110 foot communications tower on property including Bemis Hill in the towns of Athens and Rockingham in Windham County.

On June 20, 1996, Edmund and Veronica Brelsford ("Brelsforths"), through their attorney, Gerald R. Tarrant, filed a Notice of Appeal with the Board along with a Statement of Issues, List of Witnesses, and Summary of Evidence. On June 24, 1996, Sarah Ann

Martin, through her attorney, Jonathon Bump, also filed a Notice of Appeal (Ms. Martin and the Brelsforas are collectively referred to herein as "Appellants"). On July 1, 1996, Applicants, through their attorney, Peter Van Oot, filed a cross-appeal in which they contend that the District Commission erred in granting party status to the Windmill Hill Pinnacle Association ("WHP Association"). Chair Ewing scheduled a prehearing conference in this matter for July 29, 1996.

On the eve of the scheduled conference, Mr. Tarrant and Mr. Van Oot contacted Chair Ewing to inform him that the parties had been working toward an informal resolution of the issues in controversy. Accordingly, the parties requested, and Chair Ewing granted, a 60 day postponement of the prehearing conference. Parties were directed to file a status memo in mid-September and advised to plan on a September 30, 1996 prehearing conference. On September 13, 1996, Applicants filed a letter through which Applicants and Appellants requested an additional 30 day postponement. Parties stated that they would use that time to review a Memorandum of Understanding circulating among the parties which was represented to provide the structure for mediating the issues on appeal. That postponement request was also granted, and a teleconference was tentatively scheduled for November 18, 1996, in the event that an informal resolution was not reached by the parties prior to that date.

On November 4, 1996, the parties, through Mr. Tarrant, informed the Board that while they sought to resolve the matter voluntarily, there were still some issues that required additional time and consideration by the parties. Parties again sought additional time. In order for the Board and its staff to become apprised of the progress made to date, and to schedule a hearing, Chair Ewing issued a formal notice of prehearing conference for November 18, 1996, to be held by telephone.

The following persons participated in the November 18 conference:

John T. Ewing, Board Chairman
Edmund and Veronica Brelsford, by their attorney, Gerald R. Tarrant, Esq.;
Sarah Ann Martin, and her attorney, Jonathon Bump, Esq.;
Gary Savoie, and his attorney, Peter D. Van Oot, Esq.

II. PRELIMINARY ISSUES

Three preliminary issues in dispute in this matter were identified in the written submissions of the parties and during the conference. They can be categorized as follows:

1. Party status of the Windmill Hill Pinnacle Association;

2. Whether, in addition to Policies 2 and 4, the Board should review compliance with Policy 5, to determine whether the Project conforms with the requirements of the Windham Regional Plan, and thereby complies with Criterion 10 of Act 250;
3. Whether the language of the telecommunications policies of the Windham Regional Plan addressing existing facilities and existing stations, includes only those facilities and stations which are specifically designed for the transmission of telecommunication or radio broadcast signals, or whether the terms "facilities" and "stations" should be interpreted more broadly to include other structures, including those not designed for telecommunications purposes, but which for some reason (height, prominence, proximity to transmitters, etc.) are aptly suited for the purpose of accommodating a broadcast transmitter, antennae, or the like.

Parties were provided an opportunity to brief these issues. Each party did so in considerable detail. Chair Ewing reviewed the written filings and ruled on each preliminary issue in the Prehearing Conference Report and Order ("Prehearing Order") dated January 9, 1997. The Prehearing Order is incorporated herein by reference, but for the purpose of continuity, those provisions which clarify the limited scope of review in this case will be repeated. Specifically, Sections II.A.2 and II.A.3 are repeated in their entirety below:

- [II.A.] 2. Whether, in addition to Policies 2 and 4, the Board should review compliance with Policy 5, to determine whether the Project conforms with the requirements of the Windham Regional Plan, and thereby complies with Criterion 10 of Act 250.

On reconsideration of a Board denial, the Commission properly limits its review to encompass only those aspects of the project or application which have been modified to correct deficiencies noted in the Board denial. EBR 31(B)(2). However, where circumstances warrant a more exhaustive review, due to project changes, different impacts, or new evidence, the Commission has the discretion to broaden its review. The Board Rules indicate that a finding on a criterion or issue in the prior permit proceeding shall be entitled to a rebuttable presumption of validity that the project, on reconsideration, remains in compliance therewith. See EBR 31(B)(2).

Applicants have requested that the scope of the hearing be limited to a review of Policies Number 2 and 4 of the Windham Regional Plan. They cite as one reason to so limit the inquiry, the fact that the Commission only

reviewed these two policies. Notwithstanding the language of EBR 31(B)(2), the Board is obligated to conduct its review of this matter *de novo*. Obviously, the review is limited in some respect to that aspect of the Project which was declared by the Board's October 11, 1995 denial to have been deficient. The Board acknowledges that it will review essentially the same types of evidence, and will address nearly the same limited issues as were addressed by the Commission. This does not, however, require the Board to use the same analytical approach, or review only that evidence which was presented to the Commission. Indeed, such inflexible constraints on the Board's review would inappropriately curb a thorough and meaningful *de novo* review.

Having acknowledged the Board's requirement of conducting the review *de novo*, the Chair nonetheless reads the language of EBR 31(B)(2) regarding the scope of the Commission's review on reconsideration - and the establishment of rebuttable presumptions - to be equally applicable to the Board's appellate review of a reconsidered decision. The burden of proof under criterion 10 is upon the Applicant. However, in view of the foregoing discussion of EBR 31(B)(2), and the Board's October 11, 1995 decision, the Board will presume the validity of its prior findings with respect to Policy 5 (See Decision at pp. 12-20, & 26). Therefore, while the Applicants retain their burden to prove compliance with Policies 2 and 4 of the Windham Regional Plan, the Appellants will carry the burden of proving by a preponderance that the Applicants have failed to comply with the requirements of Policy 5 of the Windham Regional Plan.

Accordingly, because a comprehensive review of compliance with Policies 2 and 4 of the Windham Regional Plan may require the Board to also consider Policy 5, the Board declines to limit the scope of its review to evidence addressing only Policies 2 and 4.

- [II.A.] 3. Whether the language of the telecommunications policies of the Windham Regional Plan addressing existing facilities and existing stations, includes only those facilities and stations which are specifically designed for the transmission of telecommunication or radio broadcast signals, or whether the terms "facilities" and "stations" should be interpreted more broadly to include other structures, including those not designed for telecommunications purposes, but which for some reason (height, prominence, proximity to transmitters, etc.) are aptly suited for the purpose of accommodating a

broadcast transmitter, antennae, or the like.

Chair Ewing concurs with the Applicants that the phrases "existing station" and "existing facility," as these occur in the Windham Regional Plan, should be accorded a plain meaning. Thus, without opining on precisely what constitutes an existing station or facility, the Board will apply the plain meaning of these terms - those communications structures that are already built. With respect to the issue of co-location, this reading provides a starting point for determining which structures ought to be considered for co-location purposes. An overly broad reading that interpreted this language to include such existing structures as water towers, steeples, or silos, would lead the Board down a path toward unnecessary confusion over the issue of what then constituted an existing structure.¹ Although Appellant Sarah Ann Martin correctly points out that the term "facilities" is not specifically limited to transmission and receiving stations, the Board will read such a limitation as the plain meaning of the language as used in Policies 2 and 4 of the Windham Regional Plan.

III. THE EVIDENTIARY HEARING

On May 21, 1997, the Board convened a hearing in this matter in Grafton, Vermont. The following parties participated:

The Applicants by their counsel, R. Brad Fawley of Downs, Rachlin & Martin;
Appellant Sarah Ann Martin, by her counsel, Jonathon Bump;
Appellants Edmund and Veronica Brelsford, by their counsel, Gerald R. Tarrant; and
The Windmill Hill Pinnacle Association by its representative, Beverly Major.

After commencing the hearing, the Board conducted a site visit to the proposed tower site, and to several locations from which the proposed tower would be visible. The Chairman described the site visit for the record and there were no objections to the Chair's description. Thereafter, the Board proceeded to hear testimony through cross-examination by the parties. Immediately following the consideration of evidence in this matter, the Board deliberated. The Board next deliberated on July 23, 1997 and again on August 13, 1997. This matter is

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With respect to mitigation of adverse aesthetic impacts, this analysis should not be read as discouraging the siting of transmission and receiving facilities on prominent "structures," whether previously existing or newly constructed, which blend more favorably with the surrounding human-built or natural environment.

now ready for a decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they have been considered and are denied. See Petition of Village of Hardwick Electric Department, 143 Vt. 437, 445 (1983).

IV. ISSUE

The sole issue in this proceeding is whether the Applicants have remedied those deficiencies in their proposed Project which were identified by the Board in its Decision. The specific focus of the Board's inquiry will be determining compliance with the Regional Plan, and in particular, with Policies 2, 4, and 5 of the Regional Plan. The only Act 250 criterion under appeal is Criterion 10.

V. FINDINGS OF FACT

General

1. Gary Savoie d/b/a WLPL and Eleanor Bemis, the owner of the proposed tower site, were issued Land Use Permit #2W0991 as co-permittees by the District #2 Environmental Commission on May 21, 1996.
2. The Applicants propose to construct and operate a 110 foot communications tower with an equipment shelter, emergency generator, access trail, and power line as ancillary improvements ("Project").
3. The stated purpose of the proposed tower is to broadcast the signal of a commercial FM radio station to the Walpole, New Hampshire area. The signal would be transmitted via frequency modulation (FM) radio waves.

Applicable Provisions of the Windham Regional Plan

4. The relevant policies of the Regional Plan, all of which pertain to the proper siting of communications facilities, follow:
 2. Encourage expansion of communications at existing transmission and receiving stations if such expansion is in the best public interest.
 4. Discourage the development of new sites for transmission and receiving stations in favor of utilizing existing facilities.
 5. Strongly encourage the siting and design of satellite dishes, radio towers, antennae and other transmission and receiving

equipment to minimize negative impacts on natural and scenic resources.

FCC Allocation

5. In 1985, the Federal Communications Commission (FCC) created an allocation for a new FM radio station to serve the Town of Walpole, New Hampshire.
6. The FM signal that would be transmitted has been allocated by the FCC for a certain area. The specific area is characterized by the FCC as the "Area to Locate." To meet the FCC requirements, and to increase the probability of receiving an FCC license, the signal strength must be sufficient to reach a stated percentage of the residents of Walpole, New Hampshire. The FM frequency which would serve this allocation area is 96.3 MHz and its maximum power level would be 1.9 kilowatts, DA max.
7. The FCC regulates the allocation and siting of FM radio transmitters and is the sole entity with the legal authority to allocate bandwidth for FM transmission. In addition to authorizing FM channels, the FCC has the related, but distinct, authority to grant construction permits for FM/telecommunications towers, and also the plenary authority to grant an FCC license.
8. Once an FCC allocation has been made for an FM station, the next step in the process at the FCC is that anyone who wishes to construct a communications facility with the intent of disseminating a signal on the allocated channel to reach the area to serve may file an application for a construction permit provided that the proposed facility or tower is within the Area to Locate.

Applicant Savoie's FCC Construction Permit

9. Mr. Savoie communicated to the FCC his intent to establish an FM radio station in the Walpole, New Hampshire area. Specifically, Mr. Savoie applied for a construction permit for a 180 foot tower on Bemis Hill that he claims would serve a sufficient percentage of the residents of Walpole to warrant the issuance of an FCC license.
10. On May 6, 1993, the FCC granted Mr. Savoie a construction permit that requires his facility to serve the Town of Walpole, New Hampshire. Among other requirements, the signal from the transmission facility must meet

certain separation and contour protection requirements to ensure that the signals of other radio stations are protected.

11. Although the FCC construction permit does not specify the exact location for the proposed transmission facility, it does specify a designated Area to Locate.
12. The Area to Locate within which Mr. Savoie seeks to operate the proposed FM radio transmission facility is graphically depicted in Exhibit GS-12. GS-12 depicts an Area to Locate for the FM allocation of frequency 96.3 MHZ (colored in blue) and a "grandfathered" allocation of Channel 242 permitted under Mr. Savoie's FCC construction permit (colored in yellow).
13. These areas to locate include all or a portion of the following Vermont towns: Grafton, Windham, Rockingham, Athens, and Westminster. The Area to Locate also includes Walpole, New Hampshire and a portion of its surrounding lands.
14. In his testimony, Mr. Savoie frequently refers to his "FCC license" when he intends to discuss either the FCC construction permit or alternatively, the FCC allocation. Without venturing into the legal implications of securing an FCC construction permit as compared with an FCC license, as a factual matter, the two authorizations are distinct and the terms are not interchangeable.
15. The specifications of the proposed transmission facility which Mr. Savoie submitted in his FCC Construction Permit application depicted a 180 foot tower that was designed to provide FM radio service within the Walpole, New Hampshire area to serve.
16. Without seeking an amendment to the FCC Construction Permit, Mr. Savoie determined that the proposed tower would only need to be 110 feet high.
17. In the District Commission proceeding, and in the present appeal, the application materials depict a 110 foot tower. From most vantage points a 110 foot tower is less visible than a 180 foot tower.
18. Mr. Savoie has not secured an independent FCC construction permit to build a 110 foot tower nor has he received a permit amendment authorizing the change from a 180 foot tower to a 110 foot tower.

19. In order to obtain an FCC construction permit for the tower that he actually proposes to construct, Mr. Savoie would be required to file a Form 301 application requesting that his construction permit be modified to change the antenna height, the height of the center of radiation, the Effective Radiated Power ("ERP"), and any other pertinent data associated with a lowering of the authorized antenna height.

Coverage

20. The concept of "coverage" pertains to a transmission facility's capacity to disseminate a signal of a sufficient strength (70 decibels as measured on the dBu scale) to a designated proportion of the target audience within the area to serve.
21. The measurement of requisite signal strength is set forth in the FCC regulations as a "principal community coverage requirement." Specifically, FCC Rule 73.315(a) states that an FM station must place a signal of 70 dBu or greater "over the entire principal community to be served." However, in practice the FCC requires that an applicant for an FCC license demonstrate only "substantial compliance with the principal community coverage requirement."
22. Substantial compliance means the provision of a 70 dBu signal over at least 80% of the residential area for the target site. The residents of Walpole, New Hampshire are the targeted recipients of the proposed WLPL FM signal.
23. As an engineering proposition, it is questionable whether the diminution in tower size from 180 feet to 110 feet could still transmit of a signal of requisite strength to cover the Town of Walpole in a manner that would comply with the FCC's "coverage" requirements.
24. The broadcast of an FM signal from a 110 foot tower on the Bemis Hill site, transmitting at an ERP of 2,150 watts would effect coverage of 681 residents of Walpole, New Hampshire, or 21 percent of its population.
25. The projected coverage from the proposed tower site falls far short of "substantial compliance with the principal community coverage requirement" required by FCC regulations. Thus, FCC approval of the proposed Project, if constructed, would be unlikely without substantial project modifications or at the very least a considerable increase in the proposed Project's ERP.

26. Coverage is a function of a multitude of variables including the height of the transmission facility, the ERP, the topography of the landscape intervening between transmission facility and target audience, and, to some degree, the presence of other radio signals (i.e. interference).
27. At the time of Mr. Savoie's construction permit application, the FCC was using antiquated coverage prediction formulas that did not adequately account for terrain blockage near the transmitter site.
28. A 110 foot tower on the Bemis Hill site would not provide a direct line-of-sight path to the area to serve in and around Walpole, New Hampshire. A direct path is not absolutely necessary, but it is highly desirable. Appellants' Exhibit AM4 in its depiction of the Bemis Hill Site (Site 5) graphically demonstrates that a ridgeline impedes the signal for a considerable distance from kilometer 3.5 through kilometer 8 (from the proposed facility to the target - depicted from left to right on the figure's x axis).
29. FM radio waves do not curve around obstacles very well. Intervening topographic features do not eliminate a signal's strength, but weaken it considerably by deflecting it. The consequence is that signal strength is affected by significant shadowing and multipath distortion.
30. A computer modeling technique known as the Okumura Terrain-loss Model more accurately approximates the coverage that would be effected by a given signal to a specified site, after accounting for terrain loss. This model is used widely by cellular, paging and other telecommunications services to more realistically predict their coverage area for site planning purposes.
31. The use of the Okumura terrain-loss Model, or some other alternative which accurately predicts signal coverage, is permitted under FCC Rule 73.313(e).
32. Based on the Okumura terrain-loss model, no signal equal to, or exceeding, 70 dBu will reach the area to serve from an FM transmitter located on Bemis Hill.
33. Other existing facilities closer to the target population of Walpole, New Hampshire, even if significantly shorter than the proposed tower, and even if operated at a substantially lower ERP, could effect coverage of up to 88 percent of the Walpole population.

34. The following alternative sites, all of which were identified by the Appellants, would effect the percentage of coverage noted in the table. The table also notes the ERP and tower height necessary to effect such coverage:

Site of Existing Facility	<i>Mt. Kilburn (Site 1)</i>	<i>Oak Hill-Fire Dept., Bellows Falls (Site 2)</i>	<i>Oak Hill-NEPS N. Westminster (Site 3)</i>	<i>VT EMS, GRAS, (Site 4)</i>
Transmitter Elevation	330m/ 1083 ft.	250m/ 820 ft.	240m/ 787 ft.	160m/ 525 ft.
Tower Height	10 m/32.8 ft.	10m/32.8 ft.	10m/32.8 ft.	10m/32.8 ft.
Distance from Walpole	5.85 km/ 3.16 miles	6.06 km/ 3.27 miles	5.38km/ 2.90 miles	5.13 km/ 2.77 miles
Coverage	88	69	81	79
ERP	575 watts	900 watts	975 watts	3000 watts

All coverage estimates depict a percentage of the population of Walpole, New Hampshire.

35. The technical specifications for the above-noted alternative sites were prepared by and submitted by the Appellants. The Applicants did not demonstrate that any similar technical feasibility assessments of alternate sites had been prepared.
36. Each of the sites depicted in the above table are technically feasible alternatives to the Bemis Hill site.
37. There are other existing facilities within the Area to Locate besides those identified in the above table. However, there is no evidence involving assessments of either predicted coverage or technical feasibility with respect to those additional sites.

38. The proposed tower would consist of the following:
- a. A ROHN 65g tubular tower with three sets of guy wires.
 - b. Tower attachments including:
 - i. one FM broadcast array antenna;
 - ii. one paraflector;
 - iii. two remote pickup units (RPUS).
39. Appurtenant to the tower would be the following:
- a. A 15' by 30' ROHN prefabricated equipment shelter;
 - b. An emergency generator;
 - c. An access trail;
 - d. A private power line.

Project Tract

40. The location in which the Applicants seek to erect the proposed tower is a parcel of forested land amidst a relatively contiguous deciduous/hemlock/spruce forest. While not a pristine wilderness, the proposed tower location is largely undisturbed by human-made structures.
41. The ridgeline that includes Bemis Hill is unobstructed by human-made structures. Presently, no structure protrudes above the tops of the trees which comprise the mountaintop ridgeline that is visible from a distance. The result is an apparently undisturbed forested landscape.
42. The proposed tower would be situated on a forested hillside. The physical impact of constructing the proposed tower would only minimally disturb the trees, soil, and terrain below the tower.
43. Access to the proposed tower site would be via Ober Hill Road, a Class IV road. A section of existing logging/pasture trail would be improved for construction access.

44. The proposed tower would be accessible by snowmobiles or all-terrain vehicles on a year-round basis.
45. The proposed tower would extend approximately 60 feet above the tops of the trees which are presently standing. During periods of partial to full foliage cover, the remaining 50 feet would be obscured by leaves and/or woody vegetation. However, during the seasons in which the deciduous trees surrounding the site were without leaf cover, the lower sections of the tower might also be visible.
46. The width of that portion of the tower which would protrude above the trees would be 26.25 inches. The tower is constructed using an equilateral triangle design and would, therefore, appear equally wide from one vantage point as any other.
47. Federal Aviation Administration (FAA) regulations require towers greater than 200 feet in height to be illuminated by beacon lights. Because the proposed tower would only be 110 feet high, the tower would not require beacon lighting, and therefore, would not be visible on most nights.

Transmitter Specifications / Applicants' Needs

48. The unobstructed mounting area needed to accommodate the proposed transmission facility is 27 feet (lateral space). In addition, the transmitter would need approximately 7 feet above and below the antenna array.

Alternatives

49. Depending on structural stability and several other factors including windload and the type of existing guy wires (e.g. steel or fiberglass), an existing facility (including, but not limited to, those identified in the table at Finding of Fact 34) may need to be reconfigured or perhaps substantially redesigned to accommodate the Applicants' technical requirements.
50. Accommodation of new FM signal transmitters on existing facilities does not necessarily pose an obstacle to the continued functioning of those existing telecommunications or radio broadcast apparatus.

51. There are a number of existing facilities within the Area to Locate which could adequately host the WLPL proposed transmitter. Some of these may require significant modifications while others only slight adjustments.

Identification of Existing Facilities by the Appellants

52. In order to ascertain the physical locations of these towers, and hence, enable the study of their suitability for collocation, Applicant Savoie conducted a survey of an on-line database known as "Dataworld." This database maintains a data base of all FCC and FAA registered towers requiring clearance. Such database can be searched for a specified Area to Locate.
53. Dataworld lists only those towers greater than 200 feet in height - those which require blinking aviation lights. Most residents of Windham County would already be familiar with these sites and therefore, even one without an extensive background in tower siting issues would comprehend that a survey of the Dataworld listing would reveal no additional towers.
54. Mr. Savoie conducted a physical inventory. He contacted local power companies, put up notices at local stores, searched land records, and drove around many roads that traverse the Area to Locate. This search, purportedly consisting of approximately 200 hours, was not focused upon the most reliable indicators of existing facilities.
55. For the past eight or nine months, the FCC has maintained a master list of licensed tower sites on the Internet. Mr. Savoie did not review this compilation of towers.
56. There are approximately fifteen FCC licensed facilities in the region.

Applicants' Search for Existing Facilities and Effort to Collocate

57. Mr. Savoie did not develop a site specific plan or engineering analysis to determine what design changes may be needed to accommodate WLPL on Mount Kilburn or any other location that was identified by the Appellants.

58. Subsequent to the Board's decision denying the permit application, Mr. Savoie contacted the operator of the Mount Kilburn site. In a letter dated November 7, 1995, Mr. Savoie laid out the technical specifications that would be required for collocation of the WLPL transmitter on the Mount Kilburn/Fall Mountain Site and requested that he be permitted to locate his FM transmission facility there.
59. The Mount Kilburn site is operated by Warner Cable ("Mount Kilburn Tower"). On November 27, 1995, Terry Gould, Time Warner Cable's General Manager, responded to Mr. Savoie's request. General Manager Gould noted that Warner Cable would be unable to meet Mr. Savoie's request for forty one feet of unobstructed tower space, and could not convert from its steel guying cables to fiberglass.
60. There is no evidence of a counter-proposal or a modified request to locate on the Mount Kilburn tower. There is also no evidence of the submission of similar requests to locate the WLPL transmitter on any other existing facilities prior to the application for reconsideration with the District Commission.
61. The Applicants submitted their application for reconsideration with the District #2 Environmental Commission on January 9, 1996.
62. The deadline for the filing of prefiled direct testimony in this matter was on Tuesday, February 18, 1997.
63. Within the period extending from the date of the Board's initial Decision until the deadline for the filing of prefiled testimony in the present appeal, Applicants submitted only two documents that demonstrated an attempt to collocate on an existing facility within the Area to Locate. Both pertain to the Mount Kilburn tower.
 - a. Exhibit GS-13 is a letter dated November 7, 1995 in which Co-Applicant Savoie contacted Terry Gould, the General Manager for Warner Cable, which operates the Mount Kilburn/Fall Mountain Tower. The letter sets forth the technical requirements for the proposed WLPL FM transmitter. It makes no reference to any

specific design modifications that the Applicants propose to ensure compatibility with the existing facility, except that Applicants note that in order to accommodate the added windload, fiberglass guy wires would probably need to replace steel guys. Applicants note that such a change may not be possible due to previous structural modification.

- b. Exhibit GS-14 is a letter dated November 27, 1995 in which Terry Gould of Warner Cable responds to Co-Applicant Savoie's November 7, 1995 request by declining to accept it on the basis that the additional weight and loading factors are unacceptable.
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- 64. From a purely technological standpoint, the Mount Kilburn site is superior to the Bemis Hill site because of its greater capacity to effect coverage over more than 80 percent of the Walpole population. Moreover, because of its proximity to Walpole, it could effect such coverage at a relatively low ERP.
 - 65. For similar reasons, the sites identified as sites 2, 3, and 4 in Finding of Fact 34, would also be superior to Bemis Hill from a technological standpoint, although each of these towers might need to be modified somewhat to accommodate the proposed FM transmission facility.
 - 66. Applicants submitted another letter that was sent to Mr. Gould of Warner Cable via facsimile on February 3, 1997 requesting to collocate on the Mount Kilburn tower. This letter is nearly an exact duplicate of the letter sent on November 7, 1995; consequently this letter did not provide additional information or either technical or financial incentives to Warner Cable in conjunction with the collocation request. The request was again denied.
 - 67. Despite Mount Kilburn's superior position in relation to the area to serve, the Mount Kilburn site, after minimal negotiation between Mr. Savoie and the tower operators, was not made available to Applicants for broadcasting.
 - 68. Applicants did not contact representatives of the 3 other sites recommended by the Appellants until after receiving general information and technical studies of those sites that were prepared by Appellants' consultants in the prefiled testimony.